No. 12273

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a non-profit corporation, etc., *et al.*,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,

Respondents.

APPELLANTS' REPLY TO AMICUS CURIAE BRIEF.

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This Is an Action for Declaratory Relief.

I.

A Restatement of the Issues and the Scope of the Action.

Since this action was filed, and even since the filing of appellants' opening brief on appeal, it seems that appellees on the one hand, and now the National Labor Relations Board on the other, have led everyone concerned with this action far afield as to the precise issues involved. Appellants believe, that in the interest of justice, it would be well to once again examine the pleadings in this action, and to once again determine what remedy it is that is being sought, and why such a remedy is being sought.

What factual situation the brief filed by the National Labor Relations Board as *amicus curiae* is meant to cover is not clear to appellants, as the facts are not completely or clearly set forth in the brief. The brief may well be written to cover another factual situation, to cover facts which are not available to appellants, nor is the record on appeal available to appellants because of shortness of time. Hence the Court can readily perceive that appellants are put in the position of having to answer a problem which may or may not exist in this action, and to answer on the basis of facts with which appellants are not familiar.

However, appellants are familiar with the facts of this case and would like to briefly set them before the Court again. Briefly, they are these: Appellee unions present labor agreements containing certain provisions which appellants consider to be illegal, and appellees inform appellants that they (appellants) must sign such contracts or suffer the economic coercion which appellees will bring to bear. (It will be remembered that the appellees are not certified by the National Labor Relations Board, nor can they be due to their failure to file the requisite affidavits before the Board.) One of the provisions of such labor agreement is that "professional employees shall be included in the same bargaining unit as non-professional employees." This is, of course, contrary to Section 9(b)(1) of the Amended National Labor Relations Act, hereinafter referred to as the "Taft-Hartley Act." If the employer signs such an agreement, forcing the professional employee into a non-professional unit without his consent, the employer becomes guilty of an unfair labor practice if the employer's construction of the Taft-Hartley Act is correct. Thus, the employer has stated that he will not sign the agreement, and by becoming parties

to this suit numerous employees have indicated that if such an agreement is signed, thereby violating their property rights in their positions as professional pharmacists, they will bring actions for damages against the violating employers. And so the controversy blazes at full fury.

Appellants have alleged the presentation of the contract and the accompanying threats. In addition, they have tried to set before the Court the situation that will exist if the threats are carried into practice, and upon the basis of the past acts, methods, and practices of appellees, little doubt can exist that appellees intend to carry out the threats made. The crux of the controversy may be stated thusly: The appellee unions contend that for the purpose of collective bargaining, pharmacists and student-pharmacists are not entitled to vote separately for non-inclusion in an over-all union, as they are not professional employees within the scope of the Taft-Hartley Act. Appellants contend that such employees are professional employees and are entitled to vote separately and apart for inclusion or exclusion in any non-professional unit as they see fit, or to vote for inclusion in no labor unit whatsoever.

Now from the above controversy, these issues have arisen, to wit:

1. Is the employer guilty of an unfair labor practice if he is forced to succumb to the economic coercion of a labor union and to sign such an agreement as has been hereinbefore mentioned?

2. May the employees who are injured in their property by the signing of such an agreement by the employer have an action against such an employer for damages?

3. Is such an agreement, when signed in direct contravention to a provision of a Federal Statute, a valid and binding agreement?

4. IS THERE A FORUM IN WHICH THE RIGHTS OF THE PARTIES TO SUCH AN AGREEMENT MAY HAVE THEIR RIGHTS DECLARED PRIOR TO THE ACCRUAL OF COERCIVE RIGHTS AND OF IRREPARABLE DAMAGES TO THE PARTIES?

It is respectfully submitted that if the answer to the first three questions posed is "yes," then the answer to the fourth is equally "yes" and that such a forum is the United States District Court.

II.

Are the Parties Plaintiff to This Action Entitled to Be Heard in a District Court of the United States?

The one issue before this Court is the question of jurisdiction of the District Court of the United States to hear an action for a declaration of rights arising under a Federal Statute. Only by consideration of the questions posed above can that issue be justly solved.

As far as appellants have been able to determine, the sole objection to the District Court's jurisdiction is that the Federal Government has pre-empted the field, and conveyed, by Act of Congress, all jurisdiction over labor matters to the National Labor Relations Board. It is said that this is done by virtue of the provisions of the Taft-Hartley Act.

Stated succinctly, they contend that declaratory relief should be denied because there is a possibility that each plaintiff or another similarly situated could resort to the Board and the Board may take jurisdiction.

It is admitted by the National Labor Relations Board (their brief p. 11) that Section 10 of the Taft-Hartley Act is the sole provision that grants the alleged exclusive jurisdiction to the National Labor Relations Board to hear and decide all matters pertaining to labor and affecting commerce. That section is entitled "PREVENTION OF UNFAIR LABOR PRACTICES," and as far as is pertinent is herewith set out:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."
>
> Amended National Labor Relations Act, Sec. 10(a).

The Act then goes on to set out what the procedure of the Board shall be and how the Board shall operate. Appellants, then, would like to pose this question: Is there anything in this provision of the Act, from which the Board admittedly draws its jurisdiction, which prohibits the Courts of the United States from taking jurisdiction of any matter OTHER THAN A COMPLAINT CHARGING UNFAIR LABOR PRACTICES? Further, is there anything in this provision which interferes with the inherent Equity jurisdiction of the District Courts of the United States? Appellants respectfully submit there is nothing to prohibit such jurisdiction and herewith set out their reasons.

As was indicated in the main topics of this brief, this is an action for Declaratory Relief, asking for a declaration of rights, both of employers and employees, an attempt to determine their position prior to the accrual of

damages to either party. Appellees have not bothered to deny that a controversy exists, other than to allege that this is a hypothetical situation. Now inasmuch as this appeal arises upon the sustaining of a motion to dismiss, the federal equivalent of the demurrer, appellees have admitted every well pleaded fact to be true and cannot seriously deny that a controversy exists. The controversy existing, then, does this Court have the power to hear it? Even the appellees have indicated yes, unless the Federal Congress has pre-empted the field to the National Labor Relations Board. We come, then, to the discussion of whether or not the labor field has been so pre-empted.

The source of the National Labor Relation Board's jurisdiction has been set out above in the provisions of Section 10(a) of the Taft-Hartley Act. If the Congress meant to vest the National Labor Relations Board with the complete power over the entire labor field, would it have stricken the words "shall be exclusive" from the text of the original Labor Act, to-wit, the Wagner Act? The answer is apparent, and of course, such was not the intent. The Board attempts to answer this question by the citation of *Amazon Cotton Mill Co. v. Textile Workers Union,* 167 F. 2d 183, and a quotation from the opinion in that case. The Board is apparently overlooking the obvious; that is, in the *Amazon* case, the complaint charged that unfair labor practices were being committed, AND AN INJUNCTION WAS REQUESTED. In its opinion, the Court held nothing other than that "there was no intention on the part of the Federal Congress in the Amended National Labor Relations Act to change the Board's jurisdiction OVER UNFAIR LABOR PRACTICES" The Board calls this a *broad holding* (Board's Brief p. 19). To the contrary, it is a narrow

holding, merely reiterating the power of the Board to deal with cases charging unfair labor practices and seeking an injunction. The line of authority cited by the Board in support of the *Amazon* case are cases arising upon the same factual situations and applying the same reasoning. It is easily shown that fine judicial minds are unsettled upon even this situation, as witness the holding in the case of *Dixie Motor Coach Corp. v. Amalgamated Ass'n etc., et al.,* 14 Labor Cases, 72, 480. In the *Dixie* case, the Dixie Motor Coach Corporation had a working arrangement with the Southern Bus Lines. Southern Bus Lines became involved in a labor dispute with the union with which it had had a contract. The union threatened to picket Dixie if it continued its arrangement with Southern, and Dixie's employees stated they would not cross such a picket line if it were established. Dixie brought suit for an injunction prohibiting such secondary picketing in the District Court of the United States, Western District of Arkansas. The union defended on the grounds that the Court was without jurisdiction to issue the injunction. Appellants cite from the opinion of the Court:

> ". . . It is true that the Taft-Hartley Act does not expressly authorize a United States District Court to issue an injunction prohibiting the commission of such an act; *on the other hand, it provides that the injured party may sue for damages resulting from the unlawful act*; BUT THE Taft-Hartley Act does not forbid the issuance of an injunction under these conditions; and here we have a situation where an unlawful act is about to be committed *which will either require Dixie to become a party to the commission of such unlawful act, or close its terminal and suffer irreparable damage for which the remedy provided by the Act is inadequate*, and with resulting damage to the traveling public." (Emphasis ours.)

As conclusions of law, the Court found:

> "The court has jurisdiction of the parties and of this action . . . The court has inherent power to grant a permanent injunction in this cause."

Here the District Court found that it had jurisdiction to hear a cause which requested an *injunction* as the proper relief, and the injunction was granted. Now it is true that this decision was reversed (170 F. 2d 902), but when it is observed in the light of several other decisions, it becomes apparent that some of the finest judicial minds in this country are of the opinion that Congress not only did not intend to divest the Federal Courts of *all* jurisdiction over labor disputes, but did not even intend to divest the courts of jurisdiction in all cases of unfair labor practices.

For sustaining authority of the above proposition, the Court is referred to first, the 1941 decision in *Klein v. Herrick,* 41 Fed. Supp. 417, and *Fitzgerald v. Douds,* 167 F. 2d 714. The *Klein* case was under the old Wagner Act, and at a time when the term "shall be exclusive" was still a provision of the Labor Act. In that case the union petitioned the Federal District Court for an injunction to prevent the Board from Conducting an investigation for decertification. The Board defended on the ground that the Court did not have jurisdiction. Following is language from the opinion of Judge Rifkind in the *Klein* case (41 Fed. Supp. 417):

> "Continuing on the assumption that plaintiff is being injured by the action of defendant and is threatened with further injury, it seems clear that the National Labor Relations Board has not provided an internal method of review which would now or here-

> after fully afford plaintiff redress of the wrong committed. I do not find in Section 10 (Wagner Act) an express denial of jurisdiction to the District Court over a controversy of the character herein described; nor is there any inconsistency between the scheme for review of certain types of action delineated in the Act and the *preservation of the court's general equity jurisdiction* over controversies not reached by the Acts provisions." (Emphasis ours.)

An injunction was denied in the *Klein* case, *not due to a lack of jurisdiction in the Court*, but due to a failure of the petitioners to sustain the burden of proof of irreparable damages and continuing property damages.

It is interesting to note that the Board cites *Fitzgerald v. Douds* (167 F. 2d 714) for authority for their position; it is in fact the contrary, and a review of the decision will so prove. The *Fitzgerald* case arose upon a petition to the Federal District Court for an injunction to prevent the employer from holding a certification election. The employer had a contract with the petitioning union, but other unions had filed for representation. While the Board could not certify (or decertify as the case may be) a new union until the prior valid contract had expired, the petitioning union feared, and alleged, irreparable damage to their position and to their property interest in the contract. The injunction was denied, but the reasoning of the Court upheld the Court's jurisdiction under proper facts, as witness this language from the opinion of Justice Swan on appeal in the *Fitzgerald* case (167 F. 2d 714):

> "They contend, however, that the National Labor Relations Act has not deprived the district courts of their general equity jurisdiction under section 24 of the Judicial Code, 28 U. S. C. A., Par. 41, and that

> the Board may be enjoined from acting in a matter beyond its jurisdiction if a proper case for equitable relief is presented. They rely primarily upon *Klein v. Herrick*, D. C. S. D. N. Y., 41 F. Supp. 417, where Judge Rifkind held that the court had jurisdiction to enjoin the carrying out of an order directing an election, but dismissed the complaint on the ground that the suit was premature and the complaint failed to allege that irreparable damage had resulted or would result from the action sought to be enjoined. Judge Frank agrees with this view. If it be assumed that jurisdiction of the subject matter exists in the case at bar for the reasons stated by Judge Rifkind in *Klein v. Herrick, supra,* denial of a preliminary injunction and dismissal of the complaint were nevertheless correct . . . In the second place, the plaintiffs do not show that the holding of the hearing will cause irreparable injury." (Emphasis ours.)

Once again we find a Court, composed of judges of the eminence of Learned Hand, Thomas Swan, and Jerome Frank, sustaining the jurisdiction of the Federal Courts to hear a proper equitable case. The case is not decided on a refusal of jurisdiction, but upon the failure of plaintiffs to make a proper factual showing. It becomes more and more apparent, then, that the Federal Congress has not vested the National Labor Relations Board with exclusive jurisdiction in all Labor matters: further than that, obviously it has not vested the National Labor Relations Board with exclusive jurisdiction in every case even over unfair labor practices. If this be the case, then, and appellants can hardly comprehend a contrary finding, the following issue is pertinent at this point.

III.

Does the Board Have Exclusive Jurisdiction Over the Factual Situation Herein Presented?

In the above cases we found situations much more severe in their contradiction of the Board's position than the one appellants present in this instance. *They were suits for injunction and brought directly upon charges of unfair labor practices, or unlawful acts of the union, and they were in direct conflict with the Board's claim of exclusive jurisdiction.* Here we have a suit for a Declaratory Judgment, founded upon a controversy over the application of a Federal Statute, and the status of a particular group of people, *i. e.*, pharmacists and their status as professional or non-professional persons. If the construction of appellees is followed, the employers are forced to sign themselves into a position of liability, *for which the remedy is a suit by the employees in the United States District Court.* The employer is forced into a position from which he will suffer irreparable damages and loss of property, a loss which is continuing. It is respectfully submitted that an injunction would lie on these facts. However, is there less cause to grant relief due to the appellants' choice of the milder remedy rather than the more severe?

The Court is not without precedent in an action for Declaratory Relief upon facts arising under the National Labor Relations Act, as witness the decision by Judge McCormick in *Dist. Lodge 94 of the Int'l Ass'n of Machinists v. Akmadzich, etc.* (15 Labor Cases, 64, 564; 22 L. R. R. M. 2095). In that case *the unions* brought an action for Declaratory Relief to ascertain whether or not certain provisions of a collective bargaining contract were in contravention of the terms of the Taft-Hartley Act. Both

parties filed briefs and argued, and made motions for summary judgment. The unions argued for the validity of the contract. The motion of defendant employers was upheld and the contract declared invalid. Following this decision are the recent decisions by Judge Pierson Hall, of the District Court of the United States for the Southern District of California, that in proper cases Declaratory Relief will lie upon a controversy arising under Sections 301-303 of the Taft-Hartley Act (*Studio Carpenters Local Union No. 946, etc. v. Loew's, Inc., et al.*, 17 Labor Cases 76335; *Andrew Mackay v. Loew's, Inc.*, 17 Labor Cases 76336; both cases being found in Advance Labor Law Reports at pars. 65,356 and 65,357, respectively). Inasmuch as employee-pharmacists are parties to this action, and since both employees and employers are injured in their property, and hence under Section 303 of the Taft-Hartley Act have a right to sue, the above cited cases become of great weight, though District Court decisions and not binding on this Court.

Obviously, from the language of the Taft-Hartley Act, and the construction placed upon it by Judge Hall, Sections 301-303 do not confine persons entitled to sue thereunder to an action for damages. They may seek the less coercive relief of a Declaration of Rights, or, Declaratory Relief. This being clear, it remains only to establish the question of "diversity of citizenship" as to Section 303, that section being applicable to the wrongs threatened and the violations herein anticipated as a result of appellees' wrongful act. Appellants cannot accord with Judge Hall's requisite of diversity of citizenship in Section 303 of the Taft-Hartley Act, but if such diversity be a factor the requirement is present here as the local Retail Clerks Union is nothing

more than an agent of the International Union, is here merely attempting to effectuate the parent union's policies, and cannot act without the consent of the parent union. While appellants do not believe it would be necessary to make the International Union a party in name in order to obtain diversity, if such should be the opinion of this Court, appellants would respectfully ask leave to amend in that particular. However, it appears that every requisite of jurisdiction exists under Section 303 of the Taft-Hartley Act, as under the other qualities herein set out. To refuse jurisdiction on the grounds that the International was not a party would be to merely forestall the trial on the merits as that union could be brought in by the simple expedient of filing a new action with one party added as party defendant.

We find, then, that the complete field of labor has not been pre-empted to the jurisdiction of the Board, and that Declaratory Relief will lie where it is clear, as in the fact situation at hand, that there is no adequate relief before the Board.

Upon what premise, theory, or surmise does the Board presume to contend that the National Labor Relations Act conferred upon them the privileges of the Judiciary Act, thus granting them the power to grant Declaratory Relief? The Board seeks to intervene in this action, presenting a brief designed for another case, upon entirely different facts, and a case which is still pending as far as appellants are able to determine. Were the Court to sustain the Board's position, upon what authority could the Board grant the relief prayed for, to-wit, a declaration of rights? It is respectfully submitted there is no such authority. The intent of the Federal Congress was to vest the Board with

the power to seek injunctions in certain instances. As has been shown by appellants, the Board is not empowered to do even this in all instances. Only from Section 10(a) of the Taft-Hartley Act does the Board presume to get its jurisdiction, and that is a jurisdiction to hear and determine charges of unfair labor practices. To sustain the Board's position in this matter would be to say that by the Taft-Hartley Act, the Congress meant to vest the National Labor Relations Board with all the powers given to the Federal Courts by the Judiciary Act. This is an impossible position in which the Board has placed itself and cannot be sustained upon any construction of law or reason.

The primary difficulty with the position of the Board is that it assumes a factual situation similar to the ones in the cases cited by it. This is brought out in bold relief in the Board's brief (p. 21), in which it takes up the scope of the Declaratory Judgments Act and cites many cases for the proposition that the Act does not enlarge the jurisdiction of the Federal Courts. Appellants have in no way asserted that the jurisdiction of the Federal Courts is enlarged by the Declaratory Judgment Act. But every case upon which the Board predicates its position is a case arising upon a charge of unfair labor practices, requesting an injunction in addition to Declaratory Relief, or upon certification proceedings. While it is far from conclusive that the Federal Congress has in fact pre-empted the field on these issues to the National Labor Relations Board, there is more probability of such pre-emption than upon the facts presented here. None of the cases cited by the Board are upon such facts as arose in the *Akmadzich* case, *supra,* nor apparently is the case from

which the Board's brief is taken. Hence it is not an enlargement of the Federal Jurisdiction for an action such as this to be heard; it is merely an exercise of the discretionary jurisdiction vested in the Federal Courts. For further authority upon appellants' position, in addition to the above, and in further answer to the contentions of the Board raised upon this question, appellants respectfully request that the Court refer again to appellants' opening brief, pages 15-24, inclusive.

The question presented by the Board as to whether or not appellants have exhausted their administrative remedy has been discussed at length in appellant's opening brief, and in our reply brief to the brief of appellees. The question presents little merit, and appellants, out of respect for the time of the Court, respectfully request the Court to refer back to appellants' opening brief, pages 4-14, inclusive.

The only other direct question posed by the Board is whether or not the Court could render a decision binding upon the parties and upon the Board in this situation. The Board poses the presumption that it is vested with the power to overrule the duly constituted Courts of the United States, even where it is found that such courts have jurisdiction over the subject matter and the parties. Is this Court, and these appellants, to understand that the Taft-Hartley Act vests the Board with appellate jurisdiction over labor matters? Are we to be told that after a duly constituted Federal Court has found that it has jurisdiction, and renders a decision, by appeal to the Board a party to such a decision may have that decision overruled? To state the issue is to indulge in a presumption of egoism unequalled in the annals of American Juris-

prudence. The Taft-Hartley Act makes it too clear in its jurisdictional sections, to-wit, Sections 10(a) and Section 303(b), that the appellate jurisdiction is vested in the Federal Courts, and original jurisdiction in some instances is equally vested there. Appellants feel that to give serious consideration to these contentions of the Board would be a slur and a contempt upon this Court.

Appellants have shown that the Board is not vested with exclusive jurisdiction over labor matters, even over the severe labor situations of unfair labor practices and injunctions. What be the situation, then, if we *assume* jurisdiction in the Board in those situations? The thought leads to the following issue.

IV.

If We Assume That the Board Has Exclusive Jurisdiction Over Unfair Labor Practices, Does This Case Fall Within That Classification of Disputes?

If we assume, for the purpose of examination, that the Board is vested with exclusive jurisdiction over cases involving unfair labor practices, this case still would not fall within the Board's jurisdiction. The reasons appear far too obvious to need stating, but state them we must.

Certain acts are enumerated in Section 8(a) and (b) of the Taft-Hartley Act as constituting unfair labor practices. Since these acts which constitute unfair labor practices are enumerated, it is beyond the power of the Board to declare something other than these specified acts as unfair labor practices. Since this be so by precedent of construction of a legislative act, is there any enumerated section under which the union's acts may be placed in this

instance? An examination of that section of the Act will show that there is no section under which the acts of the appellees can be classified as an unfair labor practice. This alone takes the action away from the jurisdiction conferred by the Act upon the National Labor Relations Board.

It is further a fact established by Board precedent that an employer cannot be held in violation of the Act, or guilty of an unfair labor practice, by refusal to bargain with a non-complying union. In view of this reasoning, which is in every way fair and equitable, can it be incumbent upon an employer or employee to file a charge of unfair labor practices in order to get a declaration of rights? The answer is obviously no. The resort to the Board in such a case would be a mere idle act as there is obviously no relief the Board could grant. The present situation arises from just such a fact situation. Here the Board, and the appellees, insist that appellants have not exhausted their administrative remedy. To that contention appellants must offer this query: In view of these facts, the precedent established by the Board as to its discretion to take or deny jurisdiction, and the apparent inability of the Board to grant declaratory relief, what remedy have appellants before the Board? *The answer is, of course, no remedy at all, and resort to the Board would in this instance, as in the above, be a futile and idle act,* as the ultimate resort must be to the Federal District Courts.

Now let us make a further assumption, and assume that this is an unfair labor practice. The question then arises as to what relief the Board is empowered to grant. Section 10(c) of the Taft-Hartley Act provides only that the Board may issue a cease and desist order for which

appeal to the courts may be had by the Board for enforcement. In brief, the Board is empowered to secure injunctive relief where it finds that unfair labor practices exist. Now this situation immediately presents two further questions:

1. Can the Board issue the declaratory relief requested in this action?
2. Is the Board empowered with the discretion to exercise its jurisdiction or not to exercise it as it (the Board) sees fit?

The first question has already been answered by appellants. We would be facetious to seriously argue, as does the Board in this instance, that the Board is in fact empowered with the jurisdiction to issue declaratory relief. There remains, then, but to answer the second of the two questions.

For a long period there has existed a severe and troublesome argument between the Board and its General Counsel as to whether or not the Board's jurisdiction over unfair labor practices is a discretionary one if the practices in question affect an organization or business engaged in, or affecting, interstate commerce. The Board has taken the position that it may, or may not, as it sees fit, hear a charge of unfair labor practices. In every case where the issue has arisen, the Board has found that it has jurisdiction, but it may decline to exercise it. The General Counsel for the Board has taken the position that if the Board in fact find that commerce is affected, it *must* take jurisdiction and hear the charges. While appellants would agree with the General Counsel, and while the Board's position on this matter is contradictory, appellants believe they can show to the satisfaction of this Court that if the

Board's position in this matter is correct, the section conferring jurisdiction upon the Board is unconstitutional under the "due process" clause of the Fifth Amendment to the Constitution. (Constitution of the United States, Fifth Amendment.) The reasonableness of this construction is made crystal clear by the presentation of a few cases decided by the Board.

Due process of law in legislation requires definiteness, a reasonable relation to a proper legislative purpose, absence of arbitrariness, *and equal application.* (16 C. J. S. 1156.) The guaranty of due process does not prohibit classification for the purpose of legislation, provided there is a natural and reasonable basis therefor, and is not arbitrary or capricious, and is based on a substantial difference between those to whom it applies and those to whom it does not apply, and provided the law is so framed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances. (*United States v. Yount,* 257 Fed. 861; *United States v. Ballard,* 12 Fed. Supp. 321.) Is the Board giving equal application of the Act to the people who come before it requesting a hearing? The following citations will irrefutably demonstrate that the Board is not so doing.

In 1948 the Board exercised its jurisdiction to hear and determine a cause before it involving a drug company, in fact several drug companies and drug stores, and held that these parties were involved in a business affecting commerce sufficiently to warrant the exercise of the Board's jurisdiction, though it was found that the stores sold only one per cent (1%) or less of its merchandise outside of the state where it did business. (*Sam's Pharmacy,* 78 N. L. R. B. 104, Case No. 7-RC-28.) The case involved the determination of whether or not phar-

macists employed should be classified as professional employees, and hence free to choose whatever bargaining agent they might desire, voting independently and apart from non-professional employees. Later in 1948, the Board entertained a petition to determine whether or not certain employees of Cutter Laboratories, Berkeley, California, were professional employees, and hence free to ascertain what collective bargaining unit, if any, they wished to belong. (*In re Cutter's Laboratories,* 80 N. L. R. B. 44, 23 L. R. R. M. 1077.) In both instances, the businesses were small, of the same general class and type, and affecting commerce to virtually the same extent.

However, a few short months ago, the Board declined to exercise its jurisdiction to prevent unfair labor practices in the case of *Haleston Drug Stores, Inc.,* 82 N. L. R. B. 148. Despite the flagrant unfairness of the acts being done by the unions in this case, the Board held that the effect on commerce of the Haleston Stores was of too little consequence for them to exercise their jurisdiction, though they did find that jurisdiction existed. To the same effect are the Board's decisions in *Periera Studio and Photo Finishers Union,* 83 N. L. R. B. 87, and *Smith, H. W., dba A-1 Photo Service and Retail Clerks International Ass'n, AFL,* 83 N. L. R. B. 86; both cases being cited and quoted in appellants' opening brief at page nine (9). Of the same effect is a recent holding in regard to race tracks (*Los Angeles Turf Club* case, Labor Law Reports—Weekly Summary, 63). Now the Board is placed in this position. It finds that it has jurisdiction, on the one hand, but declines to exercise it, regardless of the extent to which the unfair labor practice has gone, if it feels that the effect on commerce is too small. BUT IT STILL REFUSES TO CONCEDE ANY OTHER FORUM TO THIS

CLASS OF PETITIONER FOR THE DESIRED RELIEF, OR ANY RELIEF, as witness the holdings by the California Supreme Court in *Ex parte De Silva,* 199 P. 2d 6, and in *Gerry v. Superior Court,* 194 P. 2d 689. Thus the Board is arbitrarily refusing relief to members of the class to which the law is to apply, and at the same time it refuses to concede jurisdiction in any other forum to hear the belabored petitioner's case. If this position of the Board is to be sustained, we have a law that operates in an unequal manner upon members of the same class. Such is a violation of the due process clause of the Fifth Amendment of the Constitution of the United States. Of course the Board's position cannot be sustained, as such a method of enforcement of the Act was not the intent of the Congress, and the only forum before which such an action as appellants bring here can be heard is the Federal District Court.

V.

Conclusion.

There remains but to summarize the facts and the issues with the proper application of precedent and of just and equitable remedies. Here we have a petitioner who cannot appeal to the Board due to the refusal of the appellee unions to file certain affidavits. In addition, there are petitioners who desire to express their refusal to being coerced into joining a union against their wishes, and indicate that they will seek coercive relief against the employers if forced into such a union. We have a controversy between petitioners and appellees as to the application of the Taft-Hartley Act, a controversy which the National Labor Relations Board has no jurisdiction to decide, either as to the subject matter or as to the relief sought.

There has been shown that the appellees and the Board are contending for a construction of the Act that would result in its unconstitutionality in that provision, a position which is untenable in view of the intent of the Congress which passed the Act. It has been incontrovertibly shown that the only forum to administer Declaratory Relief in this situation is the United States District Court. The Board in its *amicus curiae* brief, has cited much authority, all of it pertaining to completely different and strange factual situations, and none of it in point to the situation at hand. Appellants respectfully submit that the Court can reach no other conclusion but that the District Court has the power to hear and to decide and declare the rights and remedies sought in this action.

If the Board found the facts to be true, and it must be assumed that such facts are true, as this appeal arises upon appellees' motion to dismiss, the equivalent of a demurrer, can this Circuit Court do otherwise than it would have to do on a request for review of findings and conclusions? To compel resort to an idle act defeats the very purpose of the Declaratory Judgments Act and makes it meaningless, if not inoperative, in settling the rights, duties, and obligations of parties subject and amenable to a general federal law.

Respectfully submitted,

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